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Chapter XI
Immunity of State officials from foreign criminal jurisdiction

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Chapter XI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

1. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[1] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[2]

2. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[3] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[4]

3. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015) and her fifth report, during the sixty-eighth (2016) and sixty-ninth sessions (2017).[6] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has thus far provisionally adopted seven draft articles and commentaries thereto. Draft article 2 on the use of terms is still being developed.[7]

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[1] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[3] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[4] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[5] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[6] A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686 and A/CN.4/701, respectively.

[7] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194–195 and 250).

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid., Seventy-first Session, Supplement No. 10* (A/72/10), paras. 74, 76 and 140–141).

B. Consideration of the topic at the present session

4. The Commission had before it the sixth report of the Special Rapporteur (A/CN.4/722), in which she summarized the debates in the Commission and the Sixth Committee on draft article 7, dealing with crimes under international law in respect of which immunity *ratione materiae* should not apply, and which was provisionally adopted by the Commission at its sixty-ninth session. She then addressed the procedural aspects of immunity from foreign criminal jurisdiction in chapters II and III. In particular, she initiated the consideration, expected to be completed next year, of the procedural aspects of immunity, by first analysing the way in which procedural aspects had been dealt with previously in the work of the Commission, how such procedural aspects comported with the overall boundaries of the present topic and the approach that the Special Rapporteur intended to follow when analysing procedural aspects; and, secondly, providing an analysis of three components of procedural aspects related to the concept of jurisdiction, namely: (a) timing; (b) the kinds of acts affected; and (c) the determination of immunity. The report did not include new draft articles.

5. It was anticipated that the seventh report, to be submitted in 2019, would constitute the final component of the procedural aspects. The seventh report would consider such issues as: the invocation of immunity and the waiver of immunity, as well as addressing aspects concerning procedural safeguards related to both the State of the official and the foreign official concerned, including safeguards and rights that must be recognized in relation to such an official; communication between the forum State and the State of the official; transmission of information by the State of the official; and cooperation and international legal assistance between the State of the official and the forum State. In addition, the report would analyse matters related to cooperation between States and international criminal courts and the possible impact of such cooperation on immunity from foreign criminal jurisdiction. Furthermore, it would contain proposals for draft articles on the issues addressed in the sixth report and the analysis contained in the seventh report. It was hoped that the Commission would complete the first reading of the draft articles of the topic next year.

6. The Commission considered the sixth report at its 3438th to 3440th meetings, on 30 and 31 July 2018. The debate on the report would be continued and completed at the seventy-first session in 2019.

1. Introduction by the Special Rapporteur of the sixth report

7. The Special Rapporteur prefaced her introduction by stating that the sixth report, unlike previous reports, contained in the introduction a detailed summary, for information purposes, of the debate in the Commission and the Sixth Committee on draft article 7, which had been provisionally adopted by the Commission at its sixty-ninth session. Such an approach was justified given the intensity of the debate on limitations and exceptions to immunity and the related draft article 7, also bearing in mind the sensitivity of the subject and the divergence of the views expressed. Moreover, in the debate on draft article 7, attention had been drawn to the importance of considering procedural aspects that would also focus on procedural safeguards, the consideration of which for some was conditional on the adoption of draft article 7.

8. Highlighting the importance of addressing the procedural aspects in the present topic, it was recalled that aspects thereof were addressed in the memorandum by the Secretariat,[8] the third report of the former Special Rapporteur,[9] as well as by the Special Rapporteur herself in previous reports,[10] including in the informal concept paper on procedural provisions and safeguards discussed in informal consultations at the Commission's session in 2017, as well as during the interactive dialogue of the Sixth Committee in 2017. The Special Rapporteur observed that, in its prior work, the Commission had focused on the

[8] A/CN.4/596 and Corr.1.

[9] A/CN.4/646.

[10] A/CN.4/654, A/CN.4/661 and A/CN.4/701.

timing of any consideration of immunity, the invocation and the waiver of immunity, acts affected by immunity, as well as the determination of immunity. Moreover, it had considered the related analysis of the concept of jurisdiction, as well as the relationship between limitations and exceptions to immunity and procedural safeguards. Indeed, the Commission had proceeded on the assumption that it would at some stage address the procedural provisions and safeguards applicable to the present draft articles. She also recalled that the Sixth Committee had considered the procedural aspects, particularly at the sixty-sixth session of the General Assembly.

9. The Special Rapporteur, however, noted that in subsequent years, the focus with regard to the procedural aspects of immunity in the Commission had shifted somewhat from the classical aspects related to procedure, such as timing, invocation and waiver towards the need to establish procedural safeguards to avoid the politicization and abuse of the exercise of criminal jurisdiction in respect of foreign officials. Such a shift had been replicated in discussions in the Sixth Committee, where the interest in the procedural aspects was closely linked to the safeguarding and strengthening of the immunity regime and the principle of the sovereign equality of States, as well as assuring guarantees of due process. While the Special Rapporteur stressed that the need to analyse and establish procedural safeguards to prevent politically motivated proceedings and the abuse of jurisdiction was not a new subject, as the concern had been raised in earlier discussions, the debate on the issue was more pronounced in 2016 and 2017 in the context of the debate on draft article 7.

10. The Special Rapporteur stressed the significance of the consideration of the procedural aspects of immunity, bearing in mind that immunity was claimed against a foreign criminal jurisdiction. She stated that, considering procedural aspects, the Commission could offer proposals for respecting the sovereign equality of States, as well as the other legal principles and values of the international community as a whole (including the fight against impunity). She also noted that, by considering the procedural aspects, it was possible to ensure that a State official who might be affected by the exercise of foreign criminal jurisdiction enjoyed all of the procedural safeguards recognized under international law, in particular international human rights law. In the view of the Special Rapporteur, a proper consideration of the procedural aspects, by introducing a neutral element into the treatment of immunity, would provide certainty to both the forum State and the State of the official. Furthermore, it would reduce the impact of political factors and avoid unnecessary claims of abusive prosecution of an official of a foreign State for political reasons or other ends, and would also help build trust between the States concerned.

11. As regards the scope of the potential issues to be discussed, the Special Rapporteur stressed that an appreciation of the procedural aspects required a consideration of a range of granular issues, including: (a) what was meant by criminal "jurisdiction"; (b) what kinds of acts of the forum State were affected by immunity from foreign criminal jurisdiction; (c) who determined the applicability of immunity, and what effect did such a determination have on immunity; (d) when did immunity from foreign criminal jurisdiction begin to apply; (e) was invocation of immunity necessary, and who could invoke such immunity; (f) how was the waiver of immunity effected, and by whom; (g) what was the effect of the waiver of immunity on the exercise of jurisdiction; (h) how would the communication between the forum State and the State of the official be ensured, and what mechanisms could be used for such communication; (i) what mechanisms, if any, enabled the State of the official to have its legal positions made known and taken into consideration by the courts of the forum State when determining whether immunity applied in a specific case; (j) how would international judicial cooperation and assistance between the forum State and the State of the official be facilitated; (k) to what extent, and through which procedures, would the obligation to cooperate with an international criminal court be taken into consideration; and (l) how would proceedings began in the forum State be transferred to the State of the official or an international criminal court, as necessary.

12. To address such a variety of issues, the Special Rapporteur suggested that it was necessary to take into account a set of criteria consisting of the following: (a) the presence in the jurisdiction of the forum State of a foreign element identified as the "State official",

and whose acts, at least with respect to immunity *ratione materiae*, were performed in an official capacity; (b) the need to establish a balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to ensure that the immunity of its officials was respected; (c) the need to establish a balance between respecting the functional and representative character of State officials and safeguarding the fight against impunity for the commission of serious crimes under international law; and (d) ensuring that State officials would benefit from the procedural rights and guarantees recognized by international human rights law.

13. In that connection, the Special Rapporteur thought it important to pursue a broad and comprehensive approach, which would take into account four distinct but complementary dimensions:

(a) The procedural implications for immunity arising from the concept of jurisdiction, in particular with respect to timing, the identification of the acts of the forum State that may be affected by immunity and issues related to the determination of immunity;

(b) The procedural elements of autonomous procedural significance with links to the application or non-application of immunity in a given case, which served as a first-level safeguard for the State of the official, in particular questions concerning the invocation and waiver of immunity;

(c) The procedural safeguards for the State of the official, in particular mechanisms to facilitate communication and consultation between it and the forum State and to transmit information between the judicial authorities concerned, as well as instruments of international legal cooperation and mutual assistance between the States concerned;

(d) The procedural safeguards inherent in the concept of a fair trial, including respect for international human rights law.

14. The Special Rapporteur also thought it necessary that the Commission consider the effect that the obligation to cooperate with an international criminal court could have on the immunity of State officials.

15. The Special Rapporteur highlighted that the consideration of the various procedural issues required information from States on their practices. She expressed her appreciation for the comments that had been received from States and renewed her request for new contributions.

16. Turning to the content of the sixth report, the Special Rapporteur noted that, even though the various procedural aspects of immunity were interrelated and required holistic treatment, the report focused on the implications of the concept of jurisdiction for the procedural aspects of immunity. She recalled the proposal for a definition of "jurisdiction" included in her second report, which was still pending in the Drafting Committee. Although the sixth report did not intend to reopen a general discussion on the concept of jurisdiction, the Special Rapporteur stressed the significance that jurisdiction had on some procedural aspects. Accordingly, the sixth report focused on the "when", the "what" and the "who", by examining: (a) the timing of the consideration of immunity; (b) the acts of the authorities of the forum State that may be affected by immunity; and (c) the identification of the organ competent to decide whether immunity applies.

17. As regards, the timing of the consideration of immunity, the Special Rapporteur highlighted that the competent organs of the State should consider whether immunity existed at an early stage in the process, since otherwise immunity would lose its usefulness and raison d'être. However, she stressed that it was not easy to define what was meant by "an early stage", in particular because of the great variety of practices and procedures related to the criminal process in the various national legal systems. Thus, in the view of the Special Rapporteur, the timing of the consideration of immunity must be identified by combining two elements: (a) the stage of criminal procedures (investigation, prosecution and trial); and (b) the binding and coercive nature of any measure to be adopted and its effect on the foreign State official.

18. By applying such criteria, the Special Rapporteur concluded as follows:

(a) Immunity must be considered by the courts of the forum State, at the earliest possible opportunity, when they began to exercise their jurisdiction and before adopting any decision on the merits; and, in any event, when they had to take any measures expressly directed at that official imposing obligations on him or her that, in the event of non-compliance, could lead to coercive measures and that could possibly impede the proper performance of his or her State functions. Accordingly, the immunity of a State official had to be considered by the courts: (i) before commencing the prosecution of a foreign official; (ii) before bringing charges against the official or committing him or her for trial; or (iii) before commencing the hearing;

(b) Whether immunity applied at the inquiry or investigation stage was more doubtful, but it must be considered at the stage before taking any measures expressly directed at that official imposing obligations on him or her that, in the event of non-compliance, could lead to coercive measures and that could possibly impede the proper performance of his or her State functions, in particular an arrest warrant, an indictment or certain provisional measures;

(c) It appeared impossible to conclude that immunity from jurisdiction must be considered automatically from the start of an investigation, in particular because the acts of a mere investigative nature, as a rule, did not have either binding force or directly affect a State official or the performance of his or her functions.

19. As a final remark, she stressed the importance of maintaining the distinction between immunity *ratione personae* and immunity *ratione materiae* regarding the timing of the consideration of immunity, in particular taking into account the different requirements for identifying a Head of State, a Head of Government or a Minister for Foreign Affairs, on the one hand, and any other State official, on the other.

20. Regarding the kinds of acts affected by immunity, the Special Rapporteur noted that measures that were directly affected by immunity included the bringing of a criminal charge, a summons to appear before a court as a person under investigation or to attend a confirmation of charges hearing, a decision on the confirmation of charges, committal for trial, a summons to appear as the accused in a criminal trial, a court detention order or an application to extradite or surrender a foreign official. All those acts were jurisdictional in nature, directly affected a State official and could have an influence or would interfere with the performance of his or her State functions.

21. The Special Rapporteur also identified other kinds of acts of an authority of the forum State that could have an impact on the foreign official and his or her immunity from foreign criminal jurisdiction. Those included: (a) acts that were essentially executive in nature, including, for example, the detention of a foreign official as part of a police operation in the territory of the forum State or in accordance with an international arrest warrant, or of the registration of a search or arrest warrant in international police cooperation systems; (b) acts that, despite being qualified as judicial in nature, ordinarily had the purpose of exercising criminal jurisdiction over a third person rather than over a foreign official, including, for example, a summons to appear as a witness, or an order to provide a court of the forum State with information in the possession of the official; (c) precautionary measures that could be ordered by a court in the forum State in the exercise of its jurisdiction over a foreign official, but which did not in themselves have the purpose of determining his or her criminal responsibility, including, for example, interim measures aimed at attaching assets of that foreign official.

22. In the view of the Special Rapporteur, whether such acts were affected by immunity from foreign criminal jurisdiction depended on various factors, including, while bearing in mind the distinction between immunity *ratione personae* and immunity *ratione materiae*: (a) the distinction between immunity from jurisdiction and inviolability; (b) the separation between the person of the official and the assets the seizure of which was sought; and (c) the binding and coercive nature of the measure and its impact on the exercise by the foreign official of his or her functions. Thus, whether such acts were affected by immunity must be considered case by case.

23. Concerning the determination of immunity, in particular the identification of the organ in the forum State that was competent to consider and decide on the applicability of immunity, the Special Rapporteur observed that the courts of the forum State would be competent to give a definitive view on the matter, although it would also be possible for organs other than the judicial bodies (such as public prosecutors) to decide, when tasked with the investigation or preliminary proceedings, and a question arose as to immunity in relation to any of the acts affected by immunity.

24. The Special Rapporteur stressed that asserting that a foreign court was competent to give a definitive view on determining immunity did not necessarily imply that other State organs or authorities could not express their views on the matter, acting together with the courts to settle the question of immunity. In any case, the possibility for other organs or State authorities to express their views depended on national law. She expressed a similar view regarding the information provided by the State of the official, which could have considerable importance for the court's determination of immunity. The Special Rapporteur stated that that matter would be the subject of analysis in the seventh report as a cooperation issue.

25. In the view of the Special Rapporteur, the determination of immunity by the courts of the forum State must take into account various elements, depending on whether it was a matter of determining immunity *ratione personae* or immunity *ratione materiae*. Regarding the former, it was enough for the court to consider whether the State official possessed the status of Head of State, Head of Government or Minister for Foreign Affairs, and whether they were serving in that capacity at the time when the immunity had to be considered. Regarding immunity *ratione materiae*, the court had to assess: (a) whether the individual was a State official; (b) whether the acts in question were performed in an official capacity; (c) whether the acts were performed by the official during his or her term of office; and (d) whether the acts in question fell within any of the categories of crimes under international law to which immunity *ratione materiae* did not apply.

26. The Special Rapporteur also addressed the future programme of work as outlined in paragraph 5 above.

2. Summary of the debate

27. Given the limited time available to the Commission at the present session, the debate on the sixth report would be continued at its seventy-first session. Thus, the members who spoke stressed the preliminary character of their interventions while reserving the right to comment further on the report next year.

(a) General comments

28. Members commended the Special Rapporteur for her excellent and solid report, even though some members regretted its late issuance, as well as the fact that the relevant draft articles on the issues analysed in the report would only be submitted next year. It was noted that the report did not address all the procedural aspects nor deal with the relationship between the procedural and substantive aspects of the topic. Some other members observed that, even though draft articles were not proposed in the sixth report, the analysis therein provided a crucial advance in the understanding of procedural issues. Several members expressed the hope that the seventh report would be submitted for consideration in a timely manner next year.

29. Members stressed the continuing importance of the topic for States. In that connection, some members mentioned the interest of the African Union in having a request included in the agenda of the General Assembly for an advisory opinion of the International Court of Justice on the question of immunities and the relationship between articles 27 and 98 of the Rome Statute of the International Criminal Court for States parties under international law. It was reiterated that the topic was politically sensitive and legally complex, with a potential impact not only on international relations, but also on the practice of courts at the national level, thereby affording an opportunity to assist States harmonize their procedures regarding immunity of State officials. It was also underlined that the consideration of the topic required deliberation and careful treatment of and attention to

State practice. In that connection, some members regretted the absence of practice from certain regions or practice with respect to particular aspects of immunity *ratione materiae*. The paucity of practice and doctrine in matters concerning procedural aspects and safeguards was nevertheless acknowledged by other members.

30. Attention was also drawn by some members to the relationship between the topic and other topics on the current programme of work of the Commission, including crimes against humanity and peremptory norms of international law (*jus cogens*), as well as universal criminal jurisdiction, included in the long-term programme of the Commission at the current session. That had implications for the Commission as it required the pursuit of a common approach to ensure consistency and guard against fragmentation of international law. Some members recalled the need to treat the elaboration of the present topic consistently with other relevant regimes, in particular article 27, paragraph 1, of the Rome Statute of the International Criminal Court.

31. It was considered that the discussion on procedural issues was important to ensure that immunities, where applicable, were respected in order to safeguard the stability of international relations and ensure respect for the sovereign equality of States. It was equally vital to take into account the jurisdiction of the forum State, the importance of the fight against impunity and the rights of the State official concerned. It was therefore necessary for some members to ponder carefully on the types of procedures that were to be elaborated. Such procedures it was suggested should aim to achieve a delicate balance between all the various interests, including respect for immunity and ensuring the stability of international relations, and consideration of the limitations to immunity in the fight against impunity.

32. Several members expressed their support for the suggested approach of the Special Rapporteur to deal with procedural aspects broadly and comprehensively. Moreover, members alluded to the importance of addressing the dual components of procedural aspects: the traditional considerations concerning such issues as timing, invocation and waiver, as well as, more importantly, a full range of considerations concerning safeguards in the light particularly, though not exclusively, of the adoption of draft article 7.

(b) Comments on the summary of the debate on draft article 7

33. Members who spoke expressed their appreciation for the summary of the debate in the sixth report on draft article 7, the circumstances surrounding the adoption of which were recalled, with members drawing attention to various components of the debate that they considered essential. Some members reiterated their dissatisfaction with the manner in which draft article 7 had been adopted and the impact that would have on the working methods of the Commission. Some other members recalled their preference for member States to have a clear indication by the Commission of whether draft article 7 reflected existing customary international law or progressive development. In view of the anticipated completion of the topic on first reading next year, it was envisaged by some members that the Commission could afford itself a further opportunity to address the content of draft article 7, not only in order to address the question of whether it reflected customary international law or was an exercise in progressive development, but also to ameliorate the manner in which the draft article was adopted. Nevertheless, some other members recalled that the consideration of limitations and exceptions constituted the essence of the topic. In that connection, it was considered that the discussion on procedural aspects would ensure a fair and effective operation of draft article 7. It was at the same time highlighted that procedural provisions and safeguards were relevant to the whole set of draft articles, not only with respect to draft article 7. Several members looked forward to consideration of those aspects in the seventh report next year. According to another view, the feasibility of curing through procedural safeguards what were considered to be substantive fundamental flaws in draft article 7 was doubtful.

(c) Comments on the procedural aspects dealt with in the sixth report

34. Regarding the concept of jurisdiction, some members, while acknowledging the proposals of the Special Rapporteur on draft article 2 that were before the Drafting Committee, noted that it was not entirely necessary to define criminal "jurisdiction" for the purposes of the draft articles on the topic. A functional approach would be sufficient to

sketch out the parameters of jurisdiction in respect of the procedural aspects. It was suggested, as a general matter of methodology, to distinguish between the general concept of jurisdiction, including the general bases of jurisdiction of the State, and the question of the bodies that were competent to exercise the criminal jurisdiction of a particular State. For some other members, such a definition was necessary as it would bring certainty to the scope of criminal jurisdiction affected by the rules on immunity.

35. Methodologically, it was considered useful to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae* in addressing the procedural provisions, as well as subsequently the safeguards, even though some members noted that the distinction should not be exaggerated.

36. Members in general looked forward to the draft articles that would be presented by the Special Rapporteur in the seventh report on the procedural aspects considered in the sixth report.

Timing

37. Regarding the question of timing, it was generally considered that that was an area that could be considered by the Commission and on which it could offer valuable guidance on the basis of existing case law and practice.

38. In any event, members stressed the importance of addressing immunity issues at an early stage of the proceedings so as to avoid confusion at a later stage. Based on case law, it was confirmed that questions of immunity were preliminary in nature, which had to be resolved expeditiously and decided *in limine litis*. It was recalled that in the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice had stated that that principle was "a generally recognized principle of procedural law" intended to prevent "nullifying the essence of the immunity rule".[11]

39. It was nevertheless considered by some members important to address, as suggested by the Special Rapporteur, some practical aspects, such as what was meant by "an early stage" or "at the earliest opportunity", as the terms were imprecise and fraught with ambiguity. It was confirmed that, at least with respect to immunity *ratione personae*, the 2001 Vancouver resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law of the Institute of International Law indicated that immunity and inviolability to which a foreign Head of State was entitled should be afforded to him or her as soon as that status was known to them. Accordingly, it was observed that immunity must be considered without delay and in any event at the initiation of the procedure and before binding measures were taken against the State official that constituted an obstacle to the exercise of his or her functions. Moreover, it was suggested that the *Avena* case[12] could provide some guidance on addressing aspects of a practical nature concerning the immediacy of acting "without delay"; in that particular case, the Court interpreted the expression as not necessarily meaning "immediately after arrest and before interrogation".

40. Some members who spoke recognized the difficulty of determining the application of immunity rules during the investigative stages given the diversity of national law and practice in investigation and prosecution. It was still necessary for the Commission to study the matter and provide practical guidance for States.

41. It was suggested that immunity considerations should cover, in principle, the whole criminal procedure, starting from investigation, arrest, detention, extradition, transfer, prosecution, prosecutorial review, pretrial stage and provisional measures of protection, as well as formal court proceedings and judgments and their execution.

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[11] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, *I.C.J. Reports 1999*, p. 62, at p. 88, para. 63.

[12] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12.

42. Some members doubted that it was necessarily conclusive that immunity had no immediate application during the investigative stages, as much depended on the circumstances of each case and the law and practice of the particular States concerned. Such a matter required further study.

Acts affected

43. Concerning the acts of the forum States to which immunity applied, members generally agreed with the three categories canvassed by the Special Rapporteur in her sixth report — namely, detention, appearance as a witness and precautionary measures — as requiring examination. Some members noted that it was necessary to clarify what was meant by "acts affected by immunity". According to some, it was useful to distinguish between the criminal investigation of a situation and the criminal investigation of a particular case for purposes of immunity. It would be in the latter context that particular attention should be focused. In that connection, there was stress placed on the binding acts that imposed coercive measures on the State official. Accordingly, it was observed that immunity must be considered before binding measures were taken against the State official that constituted an obstacle to the exercise of his or her functions.

44. In the estimation of some members, measures would include the arrest warrant, the criminal indictment, a summons to appear before a court as an investigated person or to attend confirmation of charges hearings, and a request for extradition or surrender. It was also noted that not all acts performed during criminal proceedings implied subjecting an official to constraining coercive measures. It was noted, for instance, that a criminal complaint per se did not have a direct influence on the exercise of functions by an official.

45. Members stressed the importance of the coercive nature of the constraint measures and the consequent impediment on the exercise of functions by an official. It was recalled that in the *Arrest Warrant of 11 April 2000* case, the Court referred to protecting the individual concerned against any act of authority of another State that would hinder him or her in the performance of his or her duties,[13] while in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it stressed that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection … to a constraining act of authority".[14]

46. Suggestions were made by some members to address further the impact of inviolability on immunity, particularly on immunity *ratione materiae*, instead of overly relying on a deductive methodology or drawing certain inferences from the practice relevant to immunity *ratione personae*. It was also suggested that the role of the International Criminal Police Organization and its practice with respect, in particular, to its system of "red notices" required further in-depth analysis.

47. It was viewed necessary by some members to study further questions related to appearing as a witness, particularly with respect to immunity *ratione materiae*, including in the production of evidentiary material and documents.

48. Some members also considered that the question of precautionary measures required further consideration.

Determination of immunity

49. Some members agreed with the Special Rapporteur that it was for the courts of the forum State to determine whether immunity existed and, if so, whether there were exceptions to such immunity. Nevertheless, it was suggested that the Commission consider the procedural requirement that any exercise of jurisdiction over an official should be subject to a decision of a higher court and not the lowest magistrate court.

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[13] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 22, para. 54.

[14] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 237, para. 170.

50. Some members echoed the importance of not discounting the role to be played by executive actions. In that regard, attention was drawn to the role played nationally by the ministries responsible for foreign affairs.

51. Some other members stressed the importance of addressing, within the scope of the present topic and with a view to elaborating possible limitations, questions concerning prosecutorial discretion. That was necessary in order to avoid abusive or politically motivated prosecutions. It was noted that the establishment of guidelines for prosecutors would have the advantage of ameliorating the arbitrary or aggressive exercise of prosecutorial discretion against the troika and other State officials. Conversely, such guidelines would provide a mechanism to safeguard against the negative exercise of prosecutorial discretion in cases in which a State official who had committed a serious crime under international law was not prosecuted.

52. Some members stressed the importance of ensuring certainty in the rules concerning the applicable procedure for law enforcement. In case of doubt or ambiguity, it was suggested that there should be a State organ designated to provide appropriate instructions to the law enforcement agencies, recognizing in that regard the role played by the ministries responsible for foreign affairs.

53. It was also suggested that the question of the settlement of disputes related to questions of immunity by international courts and tribunals could be examined. It would also be necessary to examine the possible role of the Security Council in matters concerning compliance with arrest warrants or compliance with orders for the delivery of documentation.

54. Some members advocated exploring further the possible use of the waiver of immunity as an option for the State of the official.

(d) Comments on procedural safeguards and guarantees

55. The consideration of procedural safeguards and guarantees was viewed by members to be crucial to the successful completion of work on the topic. It was noted that a distinction had to be drawn between safeguards ensuring individual due process and other guarantees under international human rights law, and safeguards that aimed at protecting the stability of international relations and avoiding political and abusive prosecutions. Both aspects required treatment and it was suggested that, for safeguards to be meaningful, they should not only address the consequences of the denial of immunity of the State official in the forum State generally, but also in the specific context of draft article 7.

56. For procedural safeguards affecting the foreign official concerned, attention was drawn, for instance, to the International Covenant on Civil and Political Rights, especially its provisions safeguarding minimum international standards in criminal proceedings, such as arrest and detention (article 9), fair treatment of suspects and the accused (article 10) and the right to a fair trial (article 14).

57. Concerning safeguards with a potential impact on the stability of international relations, and the related draft article 7, the point was made that it was crucial for the Commission to make an effort to reach some common ground. In that connection, the suggestion was made that specific safeguards be developed to address questions arising from draft article 7. Such safeguards would entail that an exercise of criminal jurisdiction based upon draft article 7 was only permissible if: (a) the foreign official was present in the forum State; (b) the evidence that the official committed the alleged offence, given its exceptional gravity, was "fully conclusive";[15] (c) the decision by the forum State to pursue criminal proceedings against the foreign official was taken at the highest level of Government or prosecutorial authority; and (d) the forum State must cooperate with the State of the official.

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 129, para. 209.

58. It was further elaborated that the duty to cooperate in that regard meant that the forum State must notify the State of the official if it intended to pursue criminal proceedings and inquire whether the State of the official wished to waive the immunity of its official; and if the State of the official was able and willing to submit the matter to prosecution before its own courts, the forum State must transfer the proceedings and extradite the alleged offender to the State of the official or, if agreed between the States concerned, transfer him or her to a competent international court or tribunal. Alternatively, if the State of the official was not able or willing to submit the matter to prosecution before its own courts or before an international court or tribunal, the forum State must, before permitting the continuation of the prosecution by its national instances, offer to be ready to transfer the alleged offender to a competent international court or tribunal, if such a court or tribunal had jurisdiction.

59. Some members stressed the importance that might be played by the State of the official in exercising jurisdiction over its own officials.

(e) Future work

60. Members who spoke generally expressed support for the plan of future work suggested by the Special Rapporteur, emphasizing the need to have a complete set of draft articles on procedural aspects in the seventh report. They expressed the wish to complete the first reading of the draft articles during the next session.

61. However, while some members supported studying what effect an obligation to cooperate with the International Criminal Court might have on the immunity of State officials, others opposed such a consideration, viewing it as incompatible with draft article 1, according to which the draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law. It was nevertheless suggested that it might be useful to consider the procedural implications for immunity created by conventional obligations, according to which crimes as defined could be committed by public officials.

62. Some members stressed the importance of devising a possible communication mechanism between the forum State and the State of the official based on a system of subsidiarity or complementarity. Such a system would foster investigation and prosecution by the State of the official.

63. It was not considered useful for some members for clarity to be provided on the relationship between procedural invocation, particularly of immunity *ratione materiae*, and the consequences thereof, including for the international responsibility of the State concerned.

64. The debate on the sixth report would be continued and completed at the seventy-first session of the Commission.